

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRUCE KEITHLY, *et al.*,
v.
Plaintiffs,

INTELIUS INC., *et al.*,
v.
Defendants,

ADAPTIVE MARKETING, LLC,
v.
Third Party Defendant.

No. C09-1485RSL

ORDER DENYING THIRD PARTY
DEFENDANT ADAPTIVE
MARKETING, LLC'S MOTION TO
DISMISS

This matter comes before the Court on the “Motion to Dismiss Intelius’ Amended Third Party Complaint Against Adaptive Marketing, LLC.” Dkt. # 143. Plaintiff Donovan Lee, on behalf of a class of similarly-situated consumers, alleges that defendants Intelius Inc. and Intelius Sales, LLC (collectively, “Intelius”), used deceptive marketing practices to sell subscription services offered by Adaptive Marketing, LLC, between July 17, 2007, and the present. Plaintiffs also allege that the terms of Intelius Sales, LLC’s agreement with Adaptive Marketing make it difficult for consumers to identify, inquire about, and/or cancel the subscription service once they fall victim to the deceptive marketing practices. Intelius filed an amended third party complaint against Adaptive Marketing, alleging that if Lee is able to prove

ORDER DENYING ADAPTIVE MARKETING'S MOTION TO DISMISS

1 his deceptive marketing and/or servicing allegations, Adaptive Marketing is responsible for the
2 liability-generating activities, breached its warranty of lawful conduct, and should be required to
3 contribute to or indemnify Intelius for any damages awarded to Lee and the class.

4 Adaptive Marketing seeks dismissal of the amended third party complaint. In the
5 context of a motion to dismiss on the pleadings, the allegations of the complaint are taken in the
6 light most favorable to plaintiffs. In re Syntex Corp. Sec. Litig., 95 F.3d 922, 925-26 (9th Cir.
7 1996); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 n.2 (9th Cir. 2000). A claim will not be
8 dismissed unless the allegations in support thereof, taken as a whole, fail to give rise to a
9 plausible inference of actionable conduct. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556
10 (2007). Each of the alleged causes of action are discussed below.

11 **BACKGROUND**

12 Intelius is an on-line information service. Customers can go to Intelius' website
13 and, among other things, purchase background checks, search for individuals, and identify
14 callers by cell phone number. Since its creation in January 2003, Intelius has processed more
15 than sixteen million orders for over four million different customer accounts. When a customer
16 purchases an Intelius service, he or she is offered an array of additional products and services,
17 some of which are offered by Intelius and some of which are offered by third parties, such as
18 Adaptive Marketing. At issue in this motion are offers for Adaptive Marketing products
19 presented to the customer after he or she has purchased one or more Intelius products (*i.e.*, post-
20 transaction marketing).

21 Plaintiff Lee purchased an Intelius product on-line in June 2008. Before the
22 product was provided, Lee was shown a screen containing a thank you, a notice that his "order
23 has been successfully completed," and three text boxes. Filling in an email address and clicking
24 a button that read "Yes And show my report" in one of the text boxes resulted in the purchase of
25 an on-going service from an undisclosed entity. None of the normal cues related to a consumer

1 transaction was present: no product was selected, no order summary was provided, no payment
2 information was requested, and no confirmation of the transaction was generated. The Court has
3 already determined that this marketing technique had the capacity to deceive a substantial
4 portion of the purchasing public.

5 It is undisputed that the service offered to Lee using this technique was offered by
6 third party defendant Adaptive Marketing. Intelius alleges that the post-transaction
7 advertisements presented to Lee and similarly-situated customers were provided by Adaptive
8 Marketing and that Adaptive Marketing controlled the documentation and customer service
9 operations associated with resulting purchases. Amended Third-Party Complaint (Dkt. # 139) at
10 ¶¶ 15-16.¹ Pursuant to a July 2007 agreement between Intelius and Adaptive Marketing,
11 Adaptive Marketing warranted that it would “perform its obligations hereunder at all times in
12 accordance with all applicable laws, rules and regulations.” Decl. of Tyler L. Farmer (Dkt.
13 # 150), Ex. 1, Marketing Agreement at § 6.1. It also agreed to hold harmless and indemnify
14 Intelius from all claims asserted against it because of “any breach by [Adaptive Marketing] of
15 any representations and warranties made by [Adaptive Marketing] herein . . . or any act or
16 omission by an employee, agent or independent contractor of [Adaptive Marketing] in
17 connection with the performance of [Adaptive Marketing’s] covenants and agreements
18 hereunder.” *Id.*, Marketing Agreement at § 8. In July 2008, after plaintiff Lee transacted with
19 Intelius but within the class period, the parties amended the Marketing Agreement to add the
20 following:

21 Further, Adaptive represents, warrants and covenants that all Ad Units it
22 authorizes to be transmitted by Intelius to Intelius customers fully comply with all

23
24 ¹ Adaptive Marketing acknowledges that it provided Intelius with the exact text and images to
25 be displayed when promoting Adaptive Marketing’s membership programs, that it specified when the
26 advertisements must be displayed to customers, and that Adaptive Marketing was responsible for
customer service and fee collection related to the membership program. Reply (Dkt. # 152) at 3.

1 applicable local, state and federal laws and that such Ad Units, when accepted by
2 the customer, are sufficient to authorize Intelius to transfer to Adaptive the
3 customer's credit or debit card information (unless such transfer is otherwise
4 prohibited by Intelius' privacy policy, terms of use or any other agreement with its
customers).

5 Id., Marketing Agreement at Addendum No. 5, new § 6.5.

6 DISCUSSION

7 A. Contingent Claims

8 A condition precedent to Intelius' claims for contribution and indemnity, whether
9 under contractual or equitable theories, is that plaintiff Lee and/or the class he represents will be
10 able to establish that the post-transaction marketing campaign was deceptive. Such contingent
11 claims are common and are permitted under Fed. R. Civ. P. 14(a), which authorizes third-party
12 claims against a nonparty "who is or may be liable to [the original defending party] for all or part
13 of the claim against it." Adaptive Marketing does not challenge the adequacy of plaintiffs'
14 allegations against Intelius, which are incorporated by reference into Intelius' third party
15 complaint against Adaptive Marketing.

16 B. Breach of Contract Claim

17 Intelius alleges that, if plaintiffs are able to establish that the post-transaction
18 marketing is deceptive, Adaptive Marketing would necessarily have breached the promises it
19 made in the Marketing Agreement in one or more ways. Adaptive Marketing argues that this
20 allegation is a legal conclusion and that the breach of contract claim is inadequately pled. The
21 Court disagrees. Pursuant to Fed. R. Civ. P. 8(a)(2), a complaint must include "a short and plain
22 statement of the claim showing that the pleader is entitled to relief." Plaintiffs are not required
23 to plead detailed factual allegations or to disprove all possible defenses. Rather, a plaintiff must
24 simply avoid labels, conclusions, and formulaic recitations of the elements of a cause of action
25 in favor of factual allegations that are "enough to raise a right to relief above the speculative

1 level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting 5 C. Wright & A.
2 Miller, Federal Practice and Procedure § 1216, pp. 234-236 (3rd ed. 2004) (“The pleading must
3 contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a
4 legally cognizable right of action.”)).

5 Having reviewed the allegations of the Amended Third-Party Complaint, the
6 Court finds that they are sufficient to provide ‘fair notice’ of the nature of plaintiffs’ claims
7 against defendant and the ‘grounds’ on which the claims rest. See Twombly, 550 U.S. at 555
8 n.3. Intelius has identified the promises at issue. Amended Third-Party Complaint (Dkt. # 139)
9 at ¶¶ 15-16. First, Adaptive Marketing promised that it would perform its obligations under the
10 Marketing Agreement in accordance with all applicable laws. A finding that the Ad Units were
11 deceptive could violate that promise. Second, after July 2008, Adaptive Marketing promised
12 that the Ad Units it provided were sufficient to authorize the transfer of a customer’s credit or
13 debit card information to Adaptive Marketing. Plaintiffs allege and will attempt to prove the
14 opposite. Finally, Intelius alleges that, if plaintiffs succeed in their case, a breach of contract
15 occurred when Adaptive Marketing failed to provide necessary information and/or services to
16 customers enrolled through the post-marketing advertisements. Intelius has also alleged
17 causation and damages: if Adaptive Marketing’s breach of promise results in or contributes to
18 an award of damages in favor of plaintiffs and against Intelius, Intelius will have suffered
19 compensable injury. Intelius has adequately plead both the nature and scope of the breach of
20 contract claim.

21 **C. Contractual Indemnity**

22 Pursuant to § 8 of the Marketing Agreement:

23 Each Party (the “Indemnifying Party”) agrees to indemnify, defend and hold the
24 other Party, its officers, directors, employees, shareholders, agents, successors and
25 permitted assigns (each, an “Indemnified Person”), harmless from and against any
and all third party demands, claims, causes of action, losses, damages, liabilities,

1 costs, and expenses (including, without limitation, reasonable attorneys' fees and
2 expenses) asserted against, imposed upon, or incurred by any Indemnified Person,
3 resulting from (a) any breach by the Indemnifying Party of any representations and
4 warranties made by the Indemnifying Party herein, (b) any breach of [sic] non-
5 fulfillment in the performance of the Indemnifying Party's covenants and
6 agreements contained herein, or (c) any act or omission by an employee, agent or
7 independent contractor of the Indemnifying Party in connection with the
8 performance of the Indemnifying Party's covenants and agreements hereunder.

9 **NEITHER PARTY SHALL BE LIABLE FOR ANY INDIRECT, SPECIAL,**
10 **INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES IN**
11 **CONNECTION WITH THE PERFORMANCE OF, OR ALLEGED FAILURE**
12 **TO PERFORM, UNDER THIS AGREEMENT (INCLUDING LOSS OF**
13 **PROFITS OR REVENUE OR INTERRUPTION OF BUSINESS), EVEN IF**
14 **SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH**
15 **DAMAGES.**

16 Adaptive Marketing argues that the contractual indemnity provision is inapplicable because
17 plaintiff Lee's claims are based on decisions and actions for which Intelius was entirely
18 responsible under the Marketing Agreement. Adaptive Marketing does not, however, cite to any
19 section of the Marketing Agreement that gives Intelius unilateral control over items such as font
20 size, color, text arrangement, *etc.*, and instead acknowledges that it provided the offending text
21 and controlled the timing of the solicitation. Intelius has adequately alleged that Adaptive
22 Marketing breached its representations and warranties, triggering the indemnification provisions
23 of subsection (a). Whether Intelius shares some responsibility for some or all of plaintiffs'
24 claims cannot be resolved in the context of this motion to dismiss.

25 Adaptive Marketing also asserts that the contractual indemnity claim asserted by
26 Intelius Inc. fails because Intelius Inc. is not a party to the Marketing Agreement. Intelius
27 asserts (and plaintiffs have alleged) that Intelius Sales, LLC, the contracting party, is a wholly-
28 owned subsidiary of Intelius Inc. Because the indemnification provision applies to the
29

1 shareholders of the contracting parties, its protections may extend to Intelius Inc.²

2 **D. Contribution**

3 Intelius alleges that Adaptive Marketing collected all membership fees from
4 customers who accepted the post-transaction offers for Adaptive Marketing services. It asserts a
5 claim for “contribution from Adaptive in proportion to Adaptive’s allocable share of fault” if
6 plaintiffs prevail on their claims arising out of the post-transaction marketing scheme.

7 Adaptive Marketing argues that, under Delaware law, a claim for contribution is
8 barred when the parties have negotiated an express agreement related to indemnification. It is
9 not, however, clear that Delaware law applies to this dispute. The Marketing Agreement states
10 that the agreement “shall be governed by the laws of Delaware, without regard to its conflict of
11 law principles.” Decl. of Cory Gordon Moore (Dkt. # 144) at 6. The agreement does not state
12 that claims arising out of the Marketing Agreement or the parties’ marketing scheme will be
13 evaluated under Delaware law and instead seems to contemplate that the law of Delaware will
14 inform only contract interpretation issues. The Court has been unable to find, and the parties
15 have not cited, any Washington case in which a contribution claim was dismissed because there
16 was a contractual indemnity agreement between the parties. Washington’s contributory fault
17 statute specifically applies to acts or omissions constituting a breach of warranty, suggesting that
18 the existence of an agreement does not necessarily bar a contribution claim. RCW 4.22.010. If
19 the factfinder determines that Intelius and Adaptive Marketing are jointly liable for an
20 indivisible harm suffered by plaintiffs as a result of defendants’ deceptive and tortious conduct, a

23 ² In its motion, Adaptive Marketing asserts that Intelius cannot seek indemnification under the
24 Marketing Agreement because plaintiff Lee was not also a party to that contract. This argument is
25 unsupported and illogical. The indemnification provision is triggered by a third party claim, such as that
26 asserted by plaintiff Lee. There is no requirement that the underlying claim be based on the Marketing
Agreement itself.

1 right of contribution may exist under Washington law. See RCW 4.22.030 and RCW 4.22.040.³

2 **E. Equitable Indemnity**

3 Intelius Inc. asserts a claim for equitable indemnity.⁴ Adaptive Marketing argues
4 that this claim is barred under Delaware law because there is an express contractual indemnity
5 provision that governs. This argument fails for the reasons cited above, as well as the fact that
6 Intelius Inc. is not a party to the Marketing Agreement.

7 **F. Stay**

8 Adaptive Marketing requests that the Court stay all proceedings related to the third
9 party claims until plaintiffs have established Intelius' liability or the underlying claims are
10 dismissed. After reviewing the Marketing Agreement and the record to date, the Court finds that
11 neither judicial economy nor fairness to the parties supports a stay of these proceedings. A stay
12 would effectively bifurcate discovery: plaintiffs would continue to conduct discovery of
13 Adaptive Marketing in the initial phase of the litigation, while Intelius would be forced to wait to
14 see if plaintiffs prevail. In addition, a stay could hamper Adaptive Marketing's ability to defend
15 plaintiffs' underlying claims in this litigation by forcing it to the sidelines while plaintiffs and
16 Intelius battle on. The Court declines to issue a stay.

17 **CONCLUSION**

18 For all of the foregoing reasons, Adaptive Marketing's motion to dismiss and

20 ³ The policy arguments behind the Delaware rule – that the parties should be left to their
21 negotiated allocation of risk and contractual remedies – were recently rejected by the Washington State
22 Supreme Court in Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 387-93 (2010) (limiting
23 the economic loss doctrine and finding that tort remedies are available if the loss can be traced back to a
24 breach of a duty that existed independently of the terms of the contract, even if there is an express
25 contractual provision that also addresses the risk or loss at issue).

26 ⁴ The Court finds that this claim is adequately plead. Whether Intelius, Inc., will be able to
27 prove the elements of its equitable indemnity claim must be determined after reviewing the facts related
28 to the claim.

request for a stay are DENIED.

Dated this 13th day of June, 2011.

Robert S. Lasnik
Robert S. Lasnik
United States District Judge